APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-2246
Summary Calendar*

DONNELLY ADVERTISING CORPORATION
OF FLORIDA and
EMPIRE INDUSTRIES CORPORATION,
Plaintiffs-Appellants,

versus

CITY OF MIAMI, ET AL, ETC.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

(January 7, 1976)

BEFORE BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

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APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 74-1177-Civ-PF

DONNELLY ADVERTISING CORPORATION
OF FLORIDA, and
EMPIRE INDUSTRIES CORP.,
a Florida corporation,

Plaintiffs,

vs.

CITY OF MIAMI, a Municipal corporation;
MAURICE FERRE, Mayor;
REV. THEODORE GIBSON, City Commissioner;
ROSE GORDON, City Commissioner;
J. L. PLUMMER, City Commissioner and
MANOLO REBOSO, City Commissioner,

Defendants.

ORDER OF DISMISSAL

(Filed February 17, 1975)

The above styled matter is before the Court upon defendant's Motion to Dismiss plaintiff's Amended Complaint. Count I of the Amended Complaint alleges that Ordinance No. 6871, enacted by the defendants to prohibit the maintenance of outdoor advertising signs in its C-2 and W-1 zoning areas, and which by its language precludes anyone from seeking a variance to it, should be enjoined. Plaintiffs contend that their only resort for relief from the

ordinance is to seek an amendment thereof and that this is a violation of due process under the Fourteenth Amendment to the United States Constitution. Plaintiffs seek on that ground to have the defendants permanently enjoined from enforcing the ordinance against them.

Count II of the Amended Complaint alleges that a provision of said ordinance, which provides that five years after its enactment, all advertising then existing that violated the ordinance must be removed, and that failure to remove constitutes a crime, is an unconstitutional taking of property without just compensation, a violation of the Fourteenth Amendment. Injunctive relief is again prayed for.

Count III alleges that the defendants have taken action against them to require them to remove their signs in the C-2 and W-1 zoned areas while failing to take action against others who have non-conforming signs. Further, they allege that the defendants have not initiated action against other non-conforming uses located in non-conforming buildings except as against the advertising industry, even though the ordinance purportedly provides for their removal. Plaintiffs therefore contend that the defendants have unreasonably and arbitrarily discriminated against them in violation of their rights under the equal protection clause of the Fourteenth Amendment.

Count IV of the Amended Complaint is brought pursuant to Title 28, United States Code, Section 2201. It reiterates the plaintiffs' allegations contained in Counts I-III and further alleges that Ordinance No. 6871 contravenes Florida Statutes, §479.24 in that the City of Miami Ordinance does not provide for the removal of outdoor

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advertising signs through the power of imminent domain as mandated by Florida Statute Section 479.24. Plaintiffs therefore seek to have the City of Miami Ordinance declared null and void as violative of the Fourteenth Amendment to the United States Constitution and the laws and Constitution of the State of Florida.

Count V of the Amended Complaint asks the Court to permanently enjoin the provisions of Article XXVIII, Section 3(3) of the City of Miami Comprehensive Zoning Ordinance No. 6871, which provisions provide for the amortization of non-conforming uses. Plaintiffs contend that the City of Miami was acting outside the scope of its powers when it enacted said ordinance and thereby denied plaintiffs due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Florida, Declaration of Rights.

On July 5, 1973, the Dade County Circuit Court entered an order affirming a verdict of guilty in the Municipal Court for the City of Miami against the plaintiffs for violating the zoning Ordinance (No. 6871, as amended by No. 7338) which is the subject of this lawsuit. Included within plaintiffs' Assignments of Error to that Court were the following contentions.

1. The Court erred in determining that the ordinance under review was a valid exercise of the City of Miami's Police Power;

2. The Court erred in determining that the ordinance under review was not arbitrary, discriminatory and confiscatory as applied to Donnelly; and

3. The Court erred in determining that the ordinance under review was not a taking without compensation in violation of the Florida and United States Constitutions.

Plaintiffs thereupon appealed the Circuit Court's finding by way of a Writ of Certiorari taken to the District Court of Appeal, Third District. However, Plaintiffs' Petition was denied. Donnelly Advertising Corporation of Florida and Empire Industries Corporation v. City of Miami, Fla.App. 1974, 297 So.2d 653.

In E. B. Elliot Adv. Co. v. Metropolitan Dade County, 5th Cir., 425 F.2d 1141, 1148, the Court held:

> "Under the doctrine of res judicata, a prior judgment on the merits rendered by a state court of competent jurisdiction operates as a bar to a subsequent adjudication of the same cause of action, in substance rather than form, between the same parties or their privies in federal court, not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action, regardless of whether questions of federal or state law are involved. . . ."

This Court concludes that the issues raised in plaintiffs' complaint have been decided or could properly have been litigated in its appeal from the judgment rendered

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against it in the City of Miami Municipal Court. Consequently, plaintiffs are barred from bringing this action on the ground of res judicata.

Therefore, it is ——

ORDERED AND ADJUDGED that plaintiffs' complaint is hereby dismissed.

DONE AND ORDERED at Miami, Florida this 17th day of February, 1975.

PETER FAY
UNITED STATES
DISTRICT JUDGE

cc:
Messrs. Korner & Sampson
John S. Lloyd, City Attorney